IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20/06/2002

CORAM

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

S.A.No.885 of 1989

Munni B.Thacker .. Appellant

-Vs-

1. V.M.Vairamudi Chetty
2. N.Balakrishnan
3. N.Rathakrishnan
4. N.Dakshinamoorthy
5. Nalini
6. Apoorva Ammal
7. Rani
8. Thyagu
9. Renuka
10. Meera
11. Dandapani
12. Gangatharan
13. C.Mangalam
14. R.Kasthuri .. Respondents

Second Appeal against the decree and judgment dated 30.9.1988 made in A.S.No.232 of 1985 on the file of the learned IV Additional Judge, City Civil Court, Madras, confirming the judgment and decree dated 24 .8.1984 made in O.S.No.2750 of 1982 on the file of the learned XIV Assistant Judge, City Civil Court, Madras.

!For Appellant : Mr.T.P.Sankaran

^For respondents : No appearance

:JUDGMENT

Heard Mr.T.P.Sankaran for the appellant.

2. The appellant in the above second appeal is the first defendant in

O.S.No.2750 of 1982, on the file of the learned XIV Assistant Judge, City Civil Court, Madras, laid by the first respondent herein for:
(i) a declaration, declaring the sale deed dated 30.4.1981 in Document No.2238 of 1981 as null and void and not binding on the plaintiff, and as a sham and nominal document; and
(ii) for grant of permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the property bearing Door No.14, Veerasamy Pillai Street, Periamet, Madras-3, more fully described in the schedule to the plaint.

3. According to the first respondent/plaintiff, the suit property originally belonged to one Manickasamy Chetty, who had adopted the first respondent/plaintiff by custom and usage, since he had no issues. The first respondent/ plaintiff further contends that Manickasamy Chetty executed a will dated 17.3.1938, marked as Ex.A31, in respect of the suit property and other

properties, giving life interest to his wife Dhanammal as well as to his sister Visalakshi Ammal, who is nonetheless, the mother of the first respondent/plaintiff and to his another sister viz., Pappathi Ammal.

4. Furthermore, the first respondent/plaintiff contends that, by another will dated 7.7.1942, marked as Ex.A36, the said Manickasamy Chetty cancelled the earlier will dated 17.3.1938 and bequeathed the entire suit property to the first respondent/plaintiff, after his death. But without any right over the suit property, defendants 2 to 4, who are nonetheless the other sons of Visalakshi Ammal, viz., the natural mother of the first respondent/plaintiff, sold the suit property to the appellant/first defendant, by a sale deed dated 30.4.1981, marked as Ex.A30. On the strength of the said sale deed, the appellant/ first defendant attempted to interfere with the peaceful possession and enjoyment of the suit property by the first respondent/plaintiff. Hence the above suit.

5. The appellant/first defendant contended that the first respondent/plaintiff is not the adopted son of Manickasamy Chetty, and the will dated 7.7.1942 marked as Ex.A36, relied on by the first respondent/ plaintiff was not a genuine document, as the same was executed when Manickasamy Chetty was not in a sound state of mind, and therefore, the original will dated 17.3.1938 marked as Ex.A31 alone will prevail, according to which, defendants 2 to 4, viz., Balakrishnan, Rathakrishnan and Dakshinamoorthy, who are the brothers of the first respondent/plaintiff, and the children of defendants 2 to 4, viz., defendants 5 to 10, will have the right over the suit property.

6. Whereas, defendants 11 to 14, who are not parties to the said sale deed dated 30.4.1981, contended that they are entitled to hold their respective shares in the suit property, and that the sale deed executed by defendants 2 to 4 and their children are not binding on defendants 11 to 14.

7. On the above rival contentions,the learned XIV Assistant Judge, City Civil Court, Madras, framed the following vital issues:
(i) Whether the plaintiff is the absolute owner of the suit property?

(ii) Whether the sale deed dated 30.4.1981 executed by defendants 2 to 10 in favour of the first defendant is true and genuine, and binding on the plaintiff; if so, whether the plaintiff is entitled for declaration as prayed for?
(iii) Whether the plaintiff is entitled for injunction as prayed for?

8. The first respondent/plaintiff examined himself as P.W.1 and marked 36 documents viz., Exs.A1 to A36, of which, Ex.A1 is the certified copy of the deposition in O.S.No.346 of 1982, made by Manickasamy Chetty, who is the original owner of the suit property and the adoptive father of the first respondent/plaintiff, that the first respondent/ plaintiff is his adopted son; Ex.A30 is the sale deed of the suit property dated 30.4.1981; Ex.A31 is the will executed by Manickasamy Chetty dated 17.3.1938; Ex.A35 is the marriage invitation of the 11th defendant, who was examined as D.W.3, and Ex.A36 is the other will said to have been executed by Manickasamy Chetty dated 7.7.1942. The first defendant examined himself as D.W.1, the third defendant was examined as D.W.2 and the 11th defendant was examined as D.W.3, along with other independent witnesses and marked 6 documents, viz., Exs.B1 to B6.

9. Appreciating the evidence of P.W.1 in the light of Ex.A1 and other documentary evidences under which the first respondent/plaintiff was treated as the adopted son of Manickasamy Chetty, and finding the will dated 7.7.1942 marked as Ex.A36 is not genuine, the learned XIV Assistant Judge, City Civil Court, Madras, by decree and judgment dated 24.8.1984 made in O.S.No.2750 of 1982, granted the decree of declaration and injunction as prayed for, holding that the first respondent/plaintiff is in continuous possession and enjoyment of the suit property.

10. The appellant/first defendant preferred an appeal in A.S.No.232 of 1985 against the said decree and judgment dated 24.8.1984 made in O.S.No.2750 of 1982 and the first respondent/plaintiff preferred a cross appeal in A.S.No.301 of 1987, challenging the finding of the learned XIV Assistant Judge, City Civil Court, Madras, with regard to the will dated 7.7.1942, before the learned IV Additional Judge, City Civil Court, Madras.

11. In the above-said appeal and cross-appeal, the learned IV Additional Judge, City Civil Court, Madras, raised the following points for consideration:

i. Whether the adoption of the plaintiff is true?
ii. Whether the will dated 7.7.1942 is true?
iii. Whether the plaintiff who is the first respondent in this appeal has perfected title to the suit property by adverse possession?
iv. Whether the plaintiff is entitled to the reliefs asked for in the suit?

12. The First Appellate Court, viz., the learned IV Additional Judge, City Civil Court, Madras, by order dated 30.9.1988 made in A.S.No.2 32 of 1985 and the Cross Appeal in A.S.No.301 of 1987, finding that the original of Ex.A36 dated 7.7.1942 has not been produced before the Court, but a registered copy of the same alone was filed, held that even though the said will was not probated, the non-production of the will, by itself shall not prevent the

legatee under the will to take steps to compel the executor of the will for obtaining the probate. However, on the other points, the First Appellate Court held that the first respondent/ plaintiff is the adopted son of Manickasamy Chetty, in view of Ex.A1, the certified copy of the deposition made by Manickasamy Chetty, viz., the original owner of the suit property and the adoptive father of the first respondent/plaintiff, as well as Ex. A3 dated 6.1.1945, Ex.A4 dated 27.8.1942 and the other documentary evidences that were referred to and relied upon by the trial Court. The First Appellate Court was also satisfied that the first respondent/ plaintiff was found to be in continuous possession and enjoyment of the suit property, taking note of the documents marked as Exs.A6 to A1 5, which are related to property tax, as well as Exs.A18 to A29, which are related to several correspondence between the parties, as has been relied upon by the trial Court, and accordingly dismissed both the appeals viz., A.S.No.232 of 1985 and the Cross Appeal in A.S.No.301 of 1987. Hence, the first defendant has filed the above second appeal.

13. The second appeal was admitted on the following substantial questions of law:
(i) Whether the adoption by late Manickasamy Chetty of his sister's son, the first respondent herein, is valid under the provisions of the Hindu Law, in the absence of any pleading or proof that such adoption is allowed by way of custom or usage in their community? and
(ii) Whether the unprobated will, Ex.B-6, cannot be relied upon by the appellant to negative the alleged rights claimed by the first respondent in the suit, to the position of this case?

14.1. Mr.T.P.Sankaran, learned counsel for the appellant, contends that the first respondent/plaintiff has not proved that he is the adopted son of Manickasamy Chetty by custom and usage, and in any event, the first respondent/plaintiff happens to be the own sister’s son of Manickasamy Chetty, and therefore, the adoption itself is not just and valid as per the Hindu Law, as the same falls under the prohibitory decree of adoption inasmuch as the natural mother of the adopted son could not be married to the said Manickasamy Chetty, the adoptive father.

14.2. In any event, it is contended that since the earlier will dated 17.3.1938 marked as Ex.A31 was cancelled and a subsequent will dated 7.7.1942 marked as Ex.A36 has not been probated, the first respondent/plaintiff is not entitled to claim any right over the property placing reliance on the Will dated 7.7.1942.

14.3. Inter alia, it is contended that the suit itself is liable to be dismissed on the ground that the first respondent/plaintiff ought to have paid Court fee under Section 42 of the Tamil Nadu Court Fees and Suits Valuation Act (hereinafter referr o as the 'Act') but, not under Section 25(d) of the said Act.

15. I have given a careful consideration to the submissions of both sides.

16. The fact that the first respondent/plaintiff is the natural son of Visalakshi Ammal, who happens to be the sister of Manickasamy Chetty, is not disputed. It is true that the Madras High Court had taken a view vide:

(i) MINAKSHI V. RAMANADHA (1888) 11 Mad 49 (Full Bench);
(ii) RAGHAVENDRA RAO V. JAYARAMA RAO reported in (1897) 20 Mad 283;
(iii) SIMHADRI V. SATYANARAYANA reported in ILR (1946) Mad 475; and
(iv) ABHIRAJ KUER V. DEBENDRA SINGH reported in 1962 SC 351: 1962 BLJR 247 : 1962 (2) SCJ 174 : 1962 (3) SCR 627,
that except where there is usage to the contrary, the natural mother of the boy to be adopted, should be a person, who, in the maiden state, might lawfully have been married to the man for whom the adoption is made. But the adoption of the sister's son protected by custom and usage is an exception to the above rule, as has been held.

17. In the instant case, the adoption of the first respondent/ plaintiff by Manickasamy Chetty as deposed by him in Ex.A1 and with reference to other documentary evidences, viz., Exs.A6 to A15, which are related to property tax, as well as Exs.A18 to A29, which are related to several correspondence between the parties, were not opposed by any of the relatives of Manickasamy Chetty or his community. Once such an adoption is recognised by his community, it would be too late to set such adoption at naught.

18. That apart, the Apex Court, in ABHIRAJ KUER Vs. DEBENDRA SINGH reported in AIR 1962 SC 351, has held that the principle of adoption in breach of a prohibitory rule is only recommendatory, but not mandatory. If that be so, I am unable to accept the contention of Mr.T.P.Sankaran, learned counsel for the appellant, that the adoption itself is not just and valid as per the Hindu Law either for want of custom and usage or for want of prohibitory decree. Hence, the first substantial question of law, referred to above, is answered in negative.

19. No doubt, the will dated 7.7.1942 marked as Ex.A36, is not probated. But still, once the adoption of the first respondent/plaintiff by Manickasamy Chetty was accepted as proved, the first respondent/ plaintiff succeeds the suit property as a legal heir. On the other hand, defendants-2 to 10 have no right in the eye of law to sell the suit property to the first defendant, the appellant herein. Hence, the second substantial question of law, referred to above, is answered accordingly.

20. With regard to one another question of law that, whether the suit is liable to be dismissed for non-payment of Court fee under Section 42 of the Act, as the first respondent/plaintiff had paid court fees under Section 25(d) of the Act, I am obliged to refer the ratio laid down by this Court in NACHIMUTHU GOUNDER V. AVAL NAICKENPATTY COOPERATIVE SOCIETY reported in 1971 (I) MLJ 24 : 1983 LW 793, wherein this Court has held that in a suit for declaration that the sale is void and not binding on the first

respondent/plaintiff, the claim would fall under Section 25(d) of the Act, and since in the instant case, the first respondent/plaintiff seeks a declaration, declaring the sale deed dated 30.4.1981 as null and void and not binding on the first respondent/plaintiff, I am of the considered opinion that the court fees is payable under Section 25(d) of the Act. Hence, the issue is answered in favour of the first respondent/plaintiff.

In view of the above, all the contentions of the learned counsel for the appellant fail and the second appeal is dismissed. No costs. Consequently, C.M.P.No. 7096 of 1989 is also dismissed.

Index : Yes
Internet: Yes

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To:
The Registrar
City Civil Court
Madras.